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Supreme Court of the United States

OCTOBER TERM, 1969

No. 630

RICHARD T. BARNES, et al.,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR CERTIORARI TO THE COURT OF CLAIMS

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 70112,
Attorney for Petitioners

Deutsch, Kerrigan & Stiles,
Ralph L. Kaskell, Jr.,
René H. Himel, Jr.,
Charles K. Reasonover,
Of Counsel

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PETITION FOR CERTIORARI TO THE COURT OF CLAIMS

Petitioners seek certiorari to review a judgment of the Court of Claims, and, in support of their petition, respectfully show:

Order Below and Jurisdiction

The original order of the Court of Claims is dated April 26, 1968, and rehearing was denied on July 17, 1968. The order of the Court of Claims has not been reported. (Appendix A, pages 15-17 below). Jurisdiction of this Court lies under 28 USC 1255(1).

Questions Presented

This Court is asked to review, for the first time, provisions of the Federal Employees Pay Act, in order to harmonize discordant provisions of that Act, to resolve a conflict in decisions of the Court of Claims applying these provisions, and to reconcile the application of that Act, which regulates working conditions of federal employees, with the Fair Labor Standards Act which governs wages and hours generally.

The following questions presented by this petition are of national importance to federal employment, and to the uniformity and harmony of federal wage-hour regulation generally:

1—Whether 15% "premium pay" (the equivalent of overtime compensation for only four hours) is adequate compensation, under the Federal Employees Pay Act, for an annual average of some 20 overtime hours per week, including night and holiday work; and whether that Act should not be construed, in this regard, as being *in pari materia* with the Fair Labor Standards Act.

2—Whether a federal agency, which has failed to comply with statutory night- holiday- and overtime-pay requirements. can later avoid the effects of such noncompliance, by substituting therefor, retroactively, a less-favorable, over-all premium-pay.

Statutes Involved[1]

1—§201 of the Federal Employees Pay Act of 1945 ("the Act"), 59 Stat. 296, 5 USC §911, as amended Sept. 1, 1954, c. 1208, Title II, §203, 68 Stat. 1109, providing overtime pay, at 1-1/2 times the basic pay-rate of federal employees, for work in excess of 40 hours per week.

2—§301 of the Act, 59 Stat. 298, 5 USC §921, as amended Sept. 1, 1954, c. 1208, Title II, §206, 68 Stat. 1110, providing premium pay of 10% for work performed between 6:00 PM and 6:00 AM.

3—§302 of the Act, 59 Stat. 298, 5 USC §922, as amended Sept. 1, 1954, c. 1208, Title II, §207, 68 Stat. 1110, providing 100% premium pay for holiday work.

4—§401 of the Act added Sept. 1, 1954, c. 1208, Title II, §208(a), 68 Stat. 1111, 5 USC §926, providing that the head of a department or agency may, with approval of the Civil Service Commission, authorize premium pay, not exceeding 15% of basic compensation, for a "position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular unscheduled overtime duty and duty at night and on holidays with the officer or employee being respon-

[1] See Appendix B at page 18 for complete text of these statutory provisions. These statutes were in effect during the period involved in this case. Substantially similar provisions were re-enacted in 1967 in an overall revision of federal-employee pay legislation. 81 Stat. 195, 5 USC §§5541 *et seq.*

sible for recognizing, without supervision, circumstances which require him to remain on duty". If premium pay is so authorized, the employee "shall receive premium compensation for such duty on an annual basis in lieu of compensation provided by any other provisions of this chapter, except for regularly scheduled overtime duty. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 15 per centum) . . . by taking into consideration the frequency and duration of night, holiday and unscheduled overtime duty required in such position."

Statement of the Case[2]

Four classified civil-service employees of the United States filed this suit in the Court of Claims to recover additional compensation for overtime hours worked between 1959 and 1965. Petitioner Cecile D. Bates was substituted as administratrix of the estate of plaintiff Bates, who died in line of duty in the Louisiana marshlands at night, after rendition of the Court of Claims' order herein. Petitioners seek compensation at one and one-half times the applicable hourly rate for all hours in excess of the 40-hour administrative work week, as provided in 5 USC §911 (the Federal Employees Pay Act, hereinafter called the Act). Petitioners also seek additional compensation under the Act for night and holiday work during the same period (5

[2] References are to documents as identified in the certified record of the Court of Claims. Rule 12 of this Court's Rules.

USC §§921, 922) (Court of Claims petition, paragraphs 2-9).

Petitioners worked in Louisiana as game management agents, Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior (Affidavits, p. 1).[3]

From 1959 through July 1, 1962, petitioners received no additional compensation at all for their overtime, night and holiday work (Affidavits, p. 1). For 1962-65, they received "premium compensation" for such work under 5 USC §926, at 15% of their base pay (Affidavits, p. 1).

Petitioners and defendant both moved for summary judgment for a determination as to the Government's overtime pay liability *vel non*, asking the Court to rule as to which overtime-pay section of the Act is applicable to the 1959-62 and 1962-65 periods. (Plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment). The Court granted petitioners' motion for summary judgment for 1959-62, but held that their recovery would be limited retroactively to 15% premium compensation, despite the fact that such compensation was not administratively authorized until 1962. The action was dismissed as to 1962-65, on a holding that 15% premium compensation paid for that period covered all of petitioners' overtime, night and holiday hours, re-

[3] Factual statements are supported by plaintiffs' affidavits and exhibits submitted in support of plaintiffs' motion for summary judgment.

gardless of the regularity and number of hours involved (Appendix A).

Game agents are responsible for enforcement of the federal game laws and regulations administered by the Bureau. They participate in various game programs and surveys, and co-ordinate these projects with, and advise, a number of participating state conservation officers and biologists (Affidavits, pp. 2-3).

Undercover investigations dealing with illicit traffic in migratory birds, maintenance of contact with informers, and surveillance of activities of game-law violators and their arrest, are part of petitioners' duties. Very extensive and dangerous police-work and patrolling are required by automobile, boat and aircraft at all times of the day and night. They work on their own initiative, in remote areas, frequently dealing with professional criminals, and they are invariably on duty on week-ends, when enforcement work is at its peak (Affidavits, p. 4).

They maintain liaison with the United States attorneys to advise on enforcement of game laws and prosecution of cases; and they participate in preparation of such cases for trial, and testify therein (Affidavits, p. 4).

All of these activities, plus petitioners' other routine duties, regularly involve extended hours of work, and game agents are on call virtually 24 hours

per day (Affidavits, p. 4). This was understood by petitioners, since it was the announced policy of the Agency (Affidavits, pp. 4-5).

Petitioners were told by the Regional Supervisor, Branch Management and Enforcement, on a number of occasions, that their work could not be done in 40 hours per week, and that anyone who worked only 40 hours would be discharged. He also told them that it was necessary to "donate" time to the cause (Affidavits, p. 4).

The job-performance rating of one of the petitioners was in fact reduced from "excellent" to "satisfactory", because he "had not spent enough time in the field to do the job", although he had actually worked in excess of 1,000 overtime hours during that year (Affidavits, Carlton, p. 5, and Perroux, p. 5).

When petitioners protested that it was unfair for game agents to be required to donate overtime hours without compensation, they were told by one of the Department's officials that if he "was not satisfied with the working conditions, he could resign" (Affidavits, Carlton, p. 6, Perroux, p. 6).

Petitioners followed the directive of their superiors and worked the hours required by their Agency. All of their hours, both regular and overtime, were reported on their weekly narrative reports of activities, and their bi-weekly time and attendance reports (Affidavits, p. 2). Since July 1, 1962, pay-

ment of 15%-premium compensation has been made (Affidavits, p. 1).

Petitioners' claims for overtime, night and holiday work (Barnes—$27,940.79, Bates—$14,682.04, Carlton—$25,505.71, Perroux—$20,094.83)[4] are based on petitioners' own time and activity reports, which are official records of the Department of the Interior (Affidavits, p. 3). Non-compensable overtime hours were deducted.[5]

Reasons for Allowance of Certiorari

Question 1

The Federal Employees Pay Act provides two forms of overtime pay, in addition to the employee's basic compensation. Hours of work in excess of the 40-hour administrative workweek are to be compensated at one-and-one-half times the employee's basic hourly compensation (5 USC §911). Such overtime pay is due for all overtime hours, unless 5 USC §926 is applicable and payment there-

[4] These figures represent petitioners' total claims for overtime, night and holiday work, less an offset for premium pay received subsequent to July 1, 1962 (Petition, paragraph 10).

[5] One group of non-compensable hours included certain types of travel during overtime (5 USC §912b). The total hours reported on petitioners' records exceed the number of hours for which petitioners seek recovery. For example, Barnes' records for 1962 show that he worked 1343 overtime hours, whereas his claim is based on 917 compensable overtime hours for that year. (Plaintiffs' Motion for Summary Judgment, Exhibits 1 and 2.) This situation is similar to that of the other petitioners.

under has been authorized. §926 provides that when an employee works substantial irregular and unscheduled overtime, night and holiday hours, which cannot be controlled administratively, premium pay (in an amount not in excess of 15% of the employee's rate of basic compensation) "may" be authorized on an annual basis in lieu of ordinary overtime pay for such hours.

Petitioners' records show that they each averaged approximately 20 overtime hours per week. 15% premium pay is equal to only four overtime hours at the normal 1.5 overtime rate, or for even fewer hours when the 15% premium pay also covers night and holiday work, which alone call for premium pay of 10% and 100% respectively (5 USC §§921, 922).

Throughout the entire 1959-65 period, petitioners' records show that they averaged overtime hours far in excess of any amount to which 15% premium pay would bear a reasonable relation as just compensation under the Act, even without taking their night and holiday work into consideration.

Further, petitioners' overtime work fell outside the criteria for 15% premium pay. Their overtime work could be, and was in fact, "controlled administratively" within the premium-pay exclusion of 5 USC §926, because it was administratively induced—actually performed under threat of discharge (Affidavits, p. 4). Also, petitioners worked overtime hours "regularly" within the meaning of that term

as previously defined by the Court of Claims itself. *Aviles vs United States*, 151 Ct.Cl. 1 (1960).

Petitioners' overtime hours were thus both controlled and regular, and §926 specifically excludes controlled and regular overtime duty from the purview of 15% premium compensation.

In any event, the premium-pay provision of §926 could not conceivably have been intended to apply to a case in which the employees' overtime hours consistently exceeded many times the number required to qualify for premium pay, thereby effectively depriving the employees of compensation for all of their excessive overtime, night and holiday work.

The principle that premium pay should bear some reasonable relationship to the number of hours worked is expressed in the premium-pay statute itself, which provides that "premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 15%) . . . by taking into consideration the frequency and duration of night, holiday, and unscheduled overtime duty required in such a position" (5 USC §926).

The holding of the Court of Claims in this case also ignores the legislative history of the statute, which shows that the Congressional intent was to apply the 15% provision (a) to stand-by duty with no actual work being performed, and (b) in other cases of irregular and uncontrolled overtime in

which premium pay up to the 15% maximum would be "equitable for the employees covered". (Senate Report No. 1992, 83d Cong., 2d Sess. (1954), 3 US Code Congressional and Administrative News 3816, 3834 (1954)).

The conclusion that Congress did not intend to deprive federal employees of "equitable" overtime compensation by limiting them to a 15% premium regardless of the amount of overtime, finds further support in the similar federal wage-hour legislation covering employees generally.

Section 7(e) of the Fair Labor Standards Act [29 USC §207(e), reenacted in 1966 as §207(f)] authorizes payment of a guaranteed wage for both regular and overtime hours, when "the duties of the employee necessitate irregular hours". This section represents Congressional recognition of the validity of the so-called "Belo" contract, upheld in *Walling vs Belo Co.*, 316 US 624 (1942), and *Walling vs Halliburton Oil Well Cementing Co.*, 331 US 17 (1947).

The Department of Labor set forth its standards for enforcement of §7(e) in its Interpretative Bulletin covering overtime compensation, 29 CFR §§ 778.402 *et seq.*

§778.408 CFR requires that a Belo contract provide such a "regular rate" of pay that the annual guarantee, over a substantial period of time, shall compensate the employee at a rate which bears a

reasonable relationship to the regular rate for regular hours, and a premium rate for overtime hours.

§778.409 requires that the employee be compensated at a premium rate for all hours in excess of the maximum covered by the guarantee; and §788.412 provides that the "number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours which the employee is expected to work", so that the guarantee is "operative in a significant number of workweeks".

Although the language of the Federal Employees Pay Act differs somewhat from that of the Fair Labor Standards Act, the general purpose of both is the same and they should be construed *in pari materia*.[6]

Question 2

Under 5 USC §926, the head of a department "may" authorize premium pay, and when it has been authorized, "it is in lieu of premium compensation provided by any other provision of this chapter, except for regularly scheduled overtime duty".

Premium pay under §926 was authorized for petitioners, beginning July 1, 1962. However, the Court of Claims limited petitioners' overtime recovery for the 1959-62 period, to the 15% maximum, even though such premium pay had never been authorized for that period.

[6] *Calmar SS Corp. vs United States*, 345 US 446, 451, 455 (1953); *United States vs CIO*, 335 US 106, 112-13 (1948).

This decision is in conflict with that Court's own decisions in *Byrnes vs United States,* 163 Ct.Cl. 167, 330 F2d 986 (1964), and *Rapp vs United States,* 167 Ct.Cl. 852, 340 F2d 635 (1964), each of which held that a premium-pay authorization may not be applied retroactively.

Conclusion

The questions presented by this petition call for authoritative clarification and settlement by this Court. The holding of the Court below is contrary to the settled federal principle of just compensation for time worked, and, if allowed to stand, would be disruptive of harmony in federal wage-hour regulation as between federal and other employees, essential to the continuing orderly conduct and development of the national labor policy.

It is respectfully submitted that certiorari should be granted herein.

Eberhard P. Deutsch,
Attorney for Petitioners

Deutsch, Kerrigan & Stiles,
Ralph L. Kaskell, Jr.,
René H. Himel, Jr.,
Charles K. Reasonover,
Of Counsel

APPENDICES

APPENDIX A

ORIGINAL ORDER OF THE COURT OF CLAIMS

Before COWEN, Chief Judge, CLARK, Justice (Ret.) sitting by designation, LARAMORE, DAVIS, COLLINS, SKELTON and NICHOLS Judges.

ORDER

This case comes before the court on plaintiffs' motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with the opposition thereto, the briefs of the parties and oral argument of counsel, it is concluded that plaintiffs are entitled to recover as to the period between May 14, 1959, and July 1, 1962, with maximum recovery limited to the 15% premium compensation plaintiffs would receive under 5 USC §926 (the 1954 amendments to the Federal Employee Pay Act of 1945) and are not entitled to recover as to the period subsequent to July 1, 1962. See *Byrnes vs United States*, 163 Ct. Cl. 167, 324 F2d 966 (1963), 330 F2d 986 (1964); and *Fix vs United States*, 177 Ct. Cl. 369, 368 F2d 609 (1966).

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment is granted as to the period between May 14, 1959 and July 1, 1962, and judgment is entered for plaintiffs, in accordance herewith, for such period with the amounts of recovery to be determined pursuant to Rule 47(c);

that plaintiffs' said motion is denied as to the period subsequent to July 1, 1962 and, accordingly, that defendant's motion for summary judgment is denied as to the said period prior to July 1, 1962, and is granted for the period after that date, with plaintiffs' petition dismissed as to the period subsequent to July 1, 1962.

April 26, 1968

ORDER OF THE COURT OF CLAIMS
ON DENIAL OF REHEARING

"* * *

"156-65 Richard T. Barnes, Jack Bates, Charles V. Carlton and Joseph W. Perroux

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges, except that CLARK, Justice (Ret.), sitting by designation, participated in No. 156-65 in place of Judge Durfee, who took no part therein, and Judge Davis took no part in the consideration and decision of No. 47900.

ORDER

"These cases came before the court on motions for reconsideration, to set aside judgment, to amend judgment, for new trial and reassignment of cases to different judges, for rehearing to alter or amend

judgment or order, and for further relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

"IT IS ORDERED this 17th day of July, 1968, that said motions be and the same are denied as follows:

"* * *

"156-65	Richard T. Barnes, et al. Plaintiffs' motion for rehearing or to alter or amend order"

APPENDIX B

STATUTES INVOLVED

5 USC 911: All hours of work officially ordered or approved in excess of forty hours in any administrative workweek performed by officers and employees to whom this subchapter applies shall be considered to be overtime work and compensation for such overtime work, except as otherwise provided for in this chapter, shall be at the following rates:

(1) For each officer and employee whose basic compensation is at a rate which does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended, the overtime hourly rate of compensation shall be an amount equal to one and one-half times the hourly rate of basic compensation of such officer or employee, and all of such amount shall be considered premium compensation.

(2) For each officer and employee whose basic compensation is at a rate which exceeds the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended, the overtime hourly rate of compensation shall be an amount equal to one and one-half times the hourly rate of such minimum

scheduled rate of basic compensation, and all of such amount shall be considered premium compensation. §201 of the Federal Employees Pay Act, 59 Stat. 296, as amended Sept. 1, 1954, c. 1208, Title II, §203, 68 Stat. 1109.

5 USC 921: (a) Any regularly scheduled work between the hours of six o'clock postmeridian and six o'clock antemeridian (including periods of absence with pay during such hours due to holidays, and any such hours within periods of leave with pay if such periods total less than eight hours during any period) shall be considered nightwork, except as provided in subsection (b) of this section, and any officer or employee performing such work to whom this subchapter applies shall be compensated for such work at his rate of basic compensation plus premium compensation amounting to 10 per centum of such rate, unless otherwise provided in subchapter IV of this chapter. This section shall not operate to modify the provisions of section 180 of Title 31 or any other law authorizing additional compensation for nightwork.

(b) The head of any department, establishment, or agency, including Government-owned or controlled corporations, may designate any time after six o'clock postmeridian and any time before six o'clock antemeridian as the beginning and end, respectively, of nightwork for the purpose of subsection (a) of this section at any post outside the several States and the District of Columbia where customary hours of business extend into the hours of

nightwork provided by such subsection. §301 of the Federal Employees Pay Act, 59 Stat, 298, as amended Sept. 1, 1954, c. 1208, Title II, §206, 68 Stat. 1110.

5 USC 922: (a) All work not exceeding eight hours, which is not overtime work as defined in section 911 of this title and which is performed on a holiday designated by Federal statute, Executive order, or with respect to employees of the municipal government of the District of Columbia, by order of the Board of Commissioners of the District of Columbia, shall be compensated at the rate of basic compensation of the officer or employee performing such work on a holiday plus premium compensation at a rate equal to the rate of basic compensation of such officer or employee.

(b) Any officer or employee who is required to perform any work on such a holiday shall be compensated for at least two hours of such work, and any such premium compensation due under the provisions of this section shall be in addition to any premium compensation which may be due for the same work under the provisions of section 921 of this title providing premium compensation for nightwork.

(c) Overtime work, as defined in section 911 of this title, on Sunday and such holidays shall be compensated in accordance with the provisions of section 911 of this title. §302 of the Federal Employees Pay Act, 59 Stat. 298, as amended Sept. 1, 1954, c. 1208, Title II, §207, 68 Stat. 1110.

5 USC §926: The head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia may, with the approval of the Civil Service Commission, provide that:

> (1) any officer or employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium compensation for such duty on an annual basis in lieu of premium compensation provided by any other provisions of this chapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 25 per centum) of such part of the rate of basic compensation for any such position as does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended, by taking into consideration the number of hours of actual work required in such position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of

such position are made more onerous by night or holiday work, or by being extended over periods of more than forty hours a week, and any other relative factors; or

(2) any officer or employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty and duty at night and on holidays with the officer or employee generally being responsible for recognizing without supervision, circumstances which require him to remain on duty, shall receive premium compensation for such duty on an annual basis in lieu of premium compensation provided by any other provisions of this chapter, except for regularly scheduled overtime duty. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 15 per centum) of such part of the rate of basic compensation for any such position as does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the Classification Act of 1949, as amended, by taking into consideration the frequency and duration of night, holiday, and unscheduled overtime duty required in such position. §401 of the Federal Employees Pay Act, added Sept. 1, 1954, c. 1208, Title II, §208(a), 68 Stat. 1111.